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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

THE ILLINOIS STATE BOARD OF ELECTIONS,
Defendant-Appellant,

v.

SOCIALIST WORKERS PARTY, MICHAEL TABER, and JOHN DOE,
Plaintiffs-Appellees.

THE ILLINOIS STATE BOARD OF ELECTIONS,
Intervening Defendant-Appellant,

v.

GERALD ROSE, MELVIN JOHNSON, RICHARD LEEBOVE, UNITED STATES LABOR PARTY, JOHN BROWN, and MITCHELL HIRSCH,
Plaintiffs-Appellees,

and

JOHN HANLY, MARIE H. SUTHERS, and HOWARD C. MEDLEY, SR.,
Defendants-Appellees.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

BRIEF OF APPELLEES GERALD ROSE, U.S. LABOR PARTY, ET AL.

JEFFREY D. COLMAN
JAYNE W. BARNARD
JENNER & BLOCK
One IBM Plaza - Suite 4300
Chicago, Illinois 60611
(312) 222-9350

WILLIAM H. LUKING
ROSS, HARDIES, O'KEEFE, BABCOCK & PARSONS
One IBM Plaza - Suite 3100
Chicago, Illinois 60611
(312) 467-9300

Counsel for Appellees,
Gerald Rose,
U.S. Labor Party, et al.

Midwest Law Printing Co., Chicago 60601, FInancial 6-3988

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BRIEF OF APPELLEES GERALD ROSE, U.S. LABOR PARTY, ET AL.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 566 F.2d 586 (7th Cir. 1977) and is set forth in the Appendix to the Jurisdic-

tional Statement at pp. 3a-6a.[1] The memorandum opinion of the district court dated March 14, 1977 is reported at 433 F. Supp. 11 (N.D. Ill. 1977) and is included in the Appendix to the Jurisdictional Statement at pp. 7a-32a. The order entered by the district court on March 17, 1977 is set forth in the Appendix to the Jurisdictional Statement at p. 39a and in the joint Appendix at p. 74.

ISSUES PRESENTED

1. Whether state election statutes which require independent candidates and new political parties to obtain more nominating signatures to secure ballot placement in a local election in the City of Chicago than independent candidates or new political parties are required to obtain to secure ballot placement in elections for statewide offices violate the rights of Chicago independent candidates and new political parties and their supporters to the equal protection of the laws.

2. Whether the lower courts in this case were bound by the summary affirmance in *Jackson v. Ogilvie* even though the issues presented in this case were neither presented to nor decided by this Court in *Jackson.*

3. Whether the court of appeals properly held that the issue whether the Chicago Board of Election Commissioners had statutory authority to negotiate and enter into a settlement agreement which by its own terms applied only to the 1977 special election was moot by the time the case was heard in the court of appeals.

[1] The Appendix to Appellant's Jurisdictional Statement hereinafter will be referred to as "J.S. App. . ." References to the joint Appendix filed in this Court are designated "App. . ."

STATEMENT OF THE CASE

The Honorable Richard J. Daley, Mayor of the City of Chicago, died on December 20, 1976. Under Illinois law, the Chicago City Council was required to declare the office of Mayor vacant and to fill the vacancy within six months. Ill. Rev. Stat., Ch. 24, § 3-4-6. On January 13, 1977, the City Council ordered a Special Mayoral Election to be held on June 7, 1977.

The Chicago Board of Election Commissioners (the "Chicago Board") is an independent local governmental body which consists of three officers appointed by the Circuit Court of Cook County. Ill. Rev. Stat., Ch. 46, § 6-21.[2] On or about January 18, 1977, after the City Council called the Special Mayoral Election, the Chicago Board issued an election calendar.

The calendar granted "independent candidates" until February 19, 1977 to obtain and file the signatures of 35,947 qualified Chicago voters to secure positions on the ballot in the Special Mayoral Election.[3] "New political parties" were granted until April 4, 1977 to obtain and file the signatures of 63,373 voters to secure positions on the ballot for the same election.[4] These figures purport-

[2] Boards of election commissioners may be created by any municipality by vote of the municipality's electors. The City of Chicago adopted a board of election commissioners on November 3, 1885. *See People ex rel. Grinnell v. Hoffman*, 116 Ill. 587, 5 N.E. 596, 8 N.E. 788 (1886). Under Illinois law, municipal boards of election commissioners "have charge of and make provisions for all elections, general, special, local, municipal, state and county, and all others of every description to be held in such city or any part thereof, at any time . . ." Ill. Rev. Stat., Ch. 46, § 6-26.

[3] The definition of "independent" candidates is set forth in Ill. Rev. Stat., Ch. 46, § 10-3, which is set forth in Appendix B to this brief.

[4] "A new political party" is defined in Ill. Rev. Stat., Ch. 46, § 10-2, which is set forth in Appendix A to this brief

edly were required by Ill. Rev. Stat., Ch. 46, §§ 10-2 and 10-3, which establish the minimum signature requirements for independent candidates and new political parties running in local elections as 5% of the entire vote cast in the last preceding election for the office being sought.[5]

The Complaint

The complaint of Gerald Rose, the U. S. Labor Party, and others ("the *Rose* complaint"), was filed on January 31, 1977. Gerald Rose was an independent candidate for mayor, the U. S. Labor Party was a "new political party", and the remaining plaintiffs were qualified voters who supported Rose and/or the U. S. Labor Party. Defendants John Hanly, Marie H. Suthers and Howard C. Medley, Sr., were the members of the Chicago Board. Because the complaint attacked the constitutionality of state statutes, the State Board of Elections (the "State Board") intervened as a party defendant pursuant to 28 U.S.C. § 2403.[6]

The *Rose* complaint challenged, on First and Fourteenth Amendment grounds, both the filing dates and the signature requirements imposed by the Chicago Board in its calendar for independent candidates and new political parties. Essentially, plaintiffs maintained that their First Amendment rights were unreasonably

[5] The signature requirement for independent candidates and new political parties should have been identical. The Chicago Board later acknowledged the arithmetic error which resulted in differing signature requirements. *See* note 8, *infra* at p. 5.

[6] The State Board is a state agency charged with the "general supervision over the administration of the registration and election laws throughout the State." Ill. Const., Art. III, § 5 (1970); Ill. Rev. Stat., Ch. 46, § 1A-1.

burdened because they had an extremely limited period of time to gather the requisite number of signatures. Plaintiffs' First Amendment claims were not decided below.

The *Rose* plaintiffs also alleged that Ill. Rev. Stat., Ch. 46, §§ 10-2 and 10-3 unconstitutionally deprived plaintiffs of their right to equal protection of the laws under the Fourteenth Amendment because independent candidates and new political parties seeking ballot positions in the Chicago mayoral election were required to obtain 35,947 and 63,373 signatures respectively, while independent and new party candidates for statewide officers, pursuant to the same statutory provisions, needed only 25,000 signatures to attain ballot position in statewide elections. (App. 40, 45.)[7]

Proceedings In The District Court

A. *The March 14, 1977 Memorandum Opinion*

On February 8, 1977, the *Rose* plaintiffs moved for a preliminary and permanent injunction substantially reducing the signature requirements and extending the filing deadlines for independent candidates and new political parties seeking ballot positions in the Special Mayoral Election.[8] (App. 47-51.) On March 14, 1977, the

[7] Because the issues in the *Rose* complaint were similar to those in a case filed by the Socialist Workers Party, et al., the two cases were treated as "related cases" in the district court pursuant to Local Rule 2.21(D)(1). The Socialist Workers Party complaint raised the same First Amendment claim as the *Rose* complaint, but did not raise the equal protection claim now before this Court.

[8] While these motions were pending, the Chicago Board and the State Board jointly announced that the filing deadline for independent candidates would be extended and that the signature requirement for new political parties would be reduced. The filing deadline and signature requirements for independent candidates and new political parties running in the Special Mayoral Election were made the same: April 4, 1977 and 35,947 signatures. The district court entered an order on February 11, 1977, giving effect to this agreement. (App. 60.) This order is not at issue before this Court.

district court issued a memorandum opinion (J.S. App. 7a-32a) and entered a permanent injunction against the Chicago Board, barring enforcement of those portions of Sections 10-2 and 10-3 requiring independent candidates or new political parties to file more than 25,000 signatures in order to secure ballot positions in the Special Mayoral Election and in future local elections.

The district court entered the injunction after concluding (J.S. App. at 26a):

> "The court cannot find any rational reason why a petition with identical signatures can satisfy the legitimate state interests for restricting ballot access in state elections, and yet fail to do the same in a lesser unit. . . . Any greater requirement than 25,000 signatures cannot be said to be the least drastic means of accomplishing the state's goals, and must be found to unduly impinge the constitutional rights of independents, new political parties, and their adherents."

The district court rejected the argument that this Court's summary affirmance in *Jackson v. Ogilvie*, 325 F. Supp. 864 (N.D. Ill. 1971), *summarily aff'd.*, 403 U.S. 925 (1971), foreclosed consideration of plaintiffs' equal protection challenge to Sections 10-2 and 10-3. The district court noted (J.S. App. at 24a):

> "The defendants counter that the contrast with the 25,000 requirement was considered in *Jackson v. Ogilvie*, supra. However, it appears that it was only referred to in passing in one sentence of a brief submitted by the defendants in that case. There is no discussion of this issue whatsoever in either the majority opinion or in the dissent. In such a situation there is little reason for this court to hesitate to reevaluate an important contention. This is particularly true where it is raised in the different factual context of the forthcoming special election."

B. *The March 17 Order*

A pre-trial conference, attended by all the parties including the State Board, was held on March 17, 1977. Thereafter, an agreement was reached between the *Rose* plaintiffs and the Chicago Board. The agreement was incorporated into an order entered by the district court on March 17, 1977, stating that "solely as applied to the Special Mayoral Election to be held in Chicago on June 7, 1977," the signature requirement for independent candidates and new political parties would be further reduced from 25,000 to 20,000 signatures and the filing deadline would be extended from April 4 to April 18, 1977. (App. 74.)

C. *The Motion to Vacate*

The State Board moved to vacate both the permanent injunction and the order entered on March 17 incorporating the settlement, again relying on this Court's summary affirmance in *Jackson v. Ogilvie*. The district court denied this motion in a memorandum opinion dated April 6, 1977. (J.S. App. 33a-38a.) The court concluded (J.S. App. at 35a-36a):

> "Most importantly, the conclusion that the 5% requirement for Chicago mayoral candidates violated the equal protection clause was based upon an argument which was not considered by the *Jackson* court. The court has great respect for the principle of *stare decisis*, but is not bound by previous cases where different facts are alleged and new and persuasive legal arguments are raised." (Footnote omitted.)

The district court also reaffirmed its holding that the defendants had not demonstrated a necessary and compelling state interest, or even a rational basis, to justify the requirement that independent candidates and new political parties gather over 25,000 signatures for ballot

placement in the Special Mayoral Election while 25,000 signatures suffice under the same statutes for similarly situated candidates to obtain ballot placement in statewide elections.

Rose and the U. S. Labor Party gathered the necessary signatures and were on the ballot for the June 7, 1977 Special Mayoral Election.

Proceedings On Appeal

The State Board appealed from both the permanent injunction entered by the district court on March 14 and the March 17 order.[9] On December 9, 1977, the United States Court of Appeals for the Seventh Circuit issued an opinion (J.S. App. 3a-6a) adopting the district court's memorandum opinion and affirming the March 14, 1977 injunction order. (J.S. App. at 3a, 5a.)[10] The court of appeals dismissed as moot the State Board's appeal from the March 17 order. (J.S. App. at 6a.)

On March 9, 1978, the State Board filed its jurisdictional statement. This Court noted probable jurisdiction on April 24, 1978.

[9] The Chicago Board did not appeal from either of these orders and is present in this Court as an appellee.

[10] Because the court of appeals adopted the opinion of the district court, all references in this brief to the propriety of the district court's ruling are equally applicable to the judgment of the court of appeals.

SUMMARY OF ARGUMENT

(1) Sections 10-2 and 10-3 of the Illinois Election Code deprive plaintiffs of the equal protection of the laws by requiring independent candidates and new political parties seeking offices in the City of Chicago to obtain more signatures on nominating petitions than are required for independent candidates and new political parties seeking statewide office. Because the plaintiffs' fundamental First Amendment rights are at stake, this difference in treatment is constitutionally permissible only if it is necessary to protect a compelling state interest. The State Board has not demonstrated a compelling state interest, or even a rational basis, which could possibly justify the requirement that independent candidates and new political parties seeking local office in Chicago obtain more than 35,000 signatures to secure a place on the ballot, while similarly situated candidates and their supporters need obtain only 25,000 signatures for ballot placement in statewide elections.

(2) Rather than trying to demonstrate a compelling state interest, or even a rational basis, for the discrimination created by Sections 10-2 and 10-3, the State Board maintains that the lower courts could not enjoin the enforcement of Sections 10-2 and 10-3 because of this Court's summary affirmance in *Jackson v. Ogilvie*, 325 F. Supp. 864 (N.D. Ill. 1971), *summarily aff'd*, 403 U.S. 925 (1971). Plaintiffs' equal protection challenge to Sections 10-2 and 10-3 was not raised in *Jackson* or decided by this Court's summary action in that case. Summary affirmances by this Court are binding on lower federal courts only with regard to the "precise issues presented and necessarily decided" by this Court's

action. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Consequently, this Court's summary affirmance in *Jackson* did not bar the lower courts from reaching the merits of plaintiffs' equal protection challenge to Sections 10-2 and 10-3.

(3) The court of appeals properly declared moot the issue of the authority of the Chicago Board to consent to the district court's March 17 order in this case, in light of the fact that the order had been limited expressly to the Special Mayoral Election and the Special Election was long past. Even assuming the issue was not moot, this Court should not inquire into the authority of the Chicago Board, vis-à-vis the State Board, to negotiate a settlement, but rather should remand the case for further proceedings, with instructions that the district court retain jurisdiction while the issue is resolved in the state courts.

ARGUMENT

I.

SECTIONS 10-2 AND 10-3 OF THE ILLINOIS ELECTION CODE DEPRIVE PLAINTIFFS OF EQUAL PROTECTION BY REQUIRING MORE SIGNATURES FOR BALLOT PLACEMENT IN CHICAGO ELECTIONS THAN IN STATEWIDE ELECTIONS.

The district court properly determined that Sections 10-2 and 10-3 of the Illinois Election Code deprive plaintiffs of their right to equal protection of the laws under the Fourteenth Amendment. Under Sections 10-2 and 10-3, independent candidates and new political parties seeking statewide office need only obtain 25,000 nominating signatures. However, as applied to elections in Chicago, the 5% rule in Sections 10-2 and 10-3 requires that independent candidates and new political parties obtain in excess of 35,000 nominating signatures to secure positions on the ballot.[11] The district court held that this classification in Sections 10-2 and 10-3 was not based on any compelling state interest, and, in fact, was unsupported by any rational state interest. The decision of the district court was correct and should be affirmed by this Court.

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[11] Application of the 5% rule results in signature requirements in excess of 25,000 only in the City of Chicago and Cook County. No other cities or counties in Illinois have a large enough voting population to be similarly affected by the 5% requirement. The impact of the 5% rule in Cook County is even more egregious than in Chicago. An independent candidate running for Cook County State's Attorney in the 1980 general election, for example, will have to secure 104,426 nominating signatures (5% of the 2,088,525 votes cast for that office in the 1976 election), while an independent candidate for statewide office (*e.g.*, Attorney General) would need only 25,000 signatures.

A. Where, As Here, Fundamental Rights Are At Stake, The State Must Demonstrate A Necessary And Compelling State Interest To Support The Dissimilar Treatment Of Similarly Situated Persons.

The Fourteenth Amendment provides that: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." This clause means, at a minimum, that the state may not arbitrarily accord privileges to or impose liabilities upon one class as opposed to another, unless some rational distinction exists between those included in and those excluded from the class.

> "It is unnecessary to say that the 'equal protection of the laws' required by the Fourteenth Amendment does not prevent the States from resorting to classification for the purposes of legislation. Numerous and familiar decisions of this court establish that they have a wide range of discretion in that regard. But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

F. S. Royster Guano Co. v. Commonwealth of Virginia, 253 U.S. 412, 415 (1920). *See also Reed v. Reed*, 404 U.S. 71, 75-76 (1971); *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1076 (1969).

In numerous cases, however, this Court has concluded that when fundamental rights are at stake, the state must establish that the classification in dispute is supported by a compelling state interest, and that the classification is necessary to further the state's interest. *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (right to marry); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (right to vote); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (right of political association); *Shapiro v. Thompson*, 394 U.S. 618, 634, 638 (1969) (right to travel).

It is well established that the right to vote is a fundamental right. *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964); *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 667-68 (1966); *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968). However, as this Court has recognized, "voters can assert their preferences only through candidates or parties or both." *Lubin v. Panish*, 415 U.S. 709, 716 (1974). Therefore, statutes such as Sections 10-2 and 10-3 which establish nominating requirements for independent candidates and new political parties necessarily affect the fundamental right to vote and the protected associational rights of the candidates and of all individuals who would support independent candidates and new parties.

In *Williams v. Rhodes, supra*, this Court reviewed the burdens placed on new political parties seeking access to the ballot and stated (393 U.S. at 30-31):

> "In the present situation the state laws place burdens on two different, although overlapping kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States. Similarly we have said with reference to the right to vote: 'No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.' "[12] (Citations omitted.)

[12] *See also Dunn v. Blumstein*, 405 U.S. 330, 337 (1972); *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973).

When confronted with similar challenges to statutes alleged to impede independent or third-party candidacies or participation in the nominating process of a major political party, this Court has consistently invoked the "compelling state interest" standard of review. *Williams v. Rhodes, supra,* 393 U.S. at 38; *Storer v. Brown,* 415 U.S. 724, 728-31 (1974); *American Party of Texas v. White,* 415 U.S. 767, 780 (1974); *Bullock v. Carter,* 405 U.S. 134, 144 (1972); *Kusper v. Pontikes,* 414 U.S. 51, 58-59 (1973); *Cousins v. Wigoda,* 419 U.S. 477, 489 (1975). *See also First National Bank of Boston v. Bellotti,* ..... U.S. ....., 98 S.Ct. 1407, 1421 (1978). Because protected First Amendment freedoms are at stake in this case, the state's discriminatory treatment of plaintiffs is lawful only if the state can show a compelling interest which requires such discrimination.[13]

The district court in this case properly analyzed these principles and determined that the classification created by Sections 10-2 and 10-3 could be upheld only if the state demonstrated a necessary and compelling interest to support the classification. The court properly concluded that no state interest justified the requirement that plaintiffs obtain more than 25,000 signatures to obtain ballot placement in the Special Mayoral Election.

B. There Is No Compelling State Interest Requiring More Signatures On Nominating Petitions In Chicago Elections Than In Statewide Elections.

This Court has recognized very few state interests which may be sufficiently compelling to justify restrictions on political activity. *Rosario v. Rockefeller,* 410 U.S. 752, 761 (1973) (preservation of the integrity of the

[13] The State Board has never disputed plaintiffs' assertion that their fundamental, constitutionally-protected rights are involved in this case. Nor has the State Board challenged the fact that the "compelling state interest" test is applicable here.

electoral process); *Kusper v. Pontikes,* 414 U.S. 51, 59 (1973) (prevention of "raiding" by political parties); *Storer v. Brown,* 415 U.S. 724, 733 (1974) (stability of the political process). However, none of these interests is present in this case.

This Court has also acknowledged that there is a valid state interest in keeping frivolous candidates off the ballot, *Jenness v. Fortson,* 403 U.S. 431, 442 (1971); *Lubin v. Panish,* 415 U.S. 709, 715-16 (1974), and in keeping ballots at a manageable size. *Bullock v. Carter,* 405 U.S. 134, 145 (1972). But, this Court has held that "even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty." *Lubin, supra* at 716; *Kusper, supra,* at 59; *Williams, supra,* at 31-33. *See also First National Bank of Boston, supra,* at 1421; *NAACP v. Button,* 371 U.S. 415, 438 (1963); *Shelton v. Tucker,* 364 U.S. 479, 488 (1960).

The State Board has never suggested that a signature requirement in excess of 25,000 is necessary to keep frivolous candidates off the ballot in Chicago elections. Nor has the State Board suggested that any other state interest justifies this discriminatory treatment of Chicago independent candidates and new political parties and their supporters.[14] The 25,000 signature requirement for ballot placement in statewide elections demonstrates that the state can satisfy any valid interest it may have by a maximum 25,000 signature requirement for ballot access in Chicago elections.

[14] In its "offer of proof" filed in the district court (App. 4, 9), the State Board offered only to prove that the U.S. Labor Party and the Socialist Workers Party *could* have met the existing (35,947 signature) statutory requirement. The State Board made no offer whatsoever concerning the state's interest in that requirement.

Indeed, even if the less strenuous "rational basis" standard were applied in this case, no rational basis exists for requiring a greater number of signatures in local petition drives than is required of similarly-situated candidates in statewide petition drives. At the hearing held on March 17, 1977, the district court specifically asked counsel for the State Board what rational basis supported the classification in question. Counsel was unable to suggest any rational basis for the classification. (App. 86-87.)[15]

In *Lendall v. Jernigan*, 424 F. Supp. 951 (E.D. Ark. 1977), *summarily aff'd*, 433 U.S. 901 (1977), the district court found no rational basis to support an analogous Arkansas statutory scheme. In *Lendall*, the district court struck down a requirement that an independent candidate for state senator secure more nominating signatures than required of an independent candidate for election to an office of an Arkansas municipality which was far more populous than the senatorial district. The court stated (424 F. Supp. at 958):

> "As pointed out in *Lendall v. Bryant* [387 F. Supp. 397 (E.D. Ark. 1975)], the qualifying requirement in Arkansas for independent candidates for municipal office is much less rigorous than that imposed upon such candidates for state and district offices. An independent candidate for municipal office may have his name placed on the ballot if he obtains petitions signed by not less than nor more than 50 qualified electors of the city or ward with respect to which he desires to run. See § 3-105(c).

[15] The State Board did attempt to offer a justification for the classification in oral argument before the court of appeals. There, counsel for the State Board contended that the classification was necessary because certain city officials are "more important" than state officeholders. No basis for that statement was offered by the state and none exists.

> Moreover, the law permits him to file his petition not later than 45 days before the general election. See § 3-105.1, Act 42 of 1972. When one compares the population of the city of Little Rock with state Senatorial District No. 3, it is obvious that the former has many more electors than the latter. But fewer signatures are required to qualify for the municipal ballot position than are required for an independent seeking to qualify as a candidate for Senatorial District No. 3. Traditionally, municipal elections have been nonpartisan in the sense that all candidates usually run as 'independents'. The legislation here under scrutiny reflects, arguably, a greater concern to protect candidates nominated in party primaries from opposition in the general election than to protect one 'independent' from another. This is not the type of concern that can be equated with the state's possible interest in avoiding voter confusion by limiting ballot access to those demonstrating significant voter support."

As in *Lendall*, no rational basis, let alone a compelling state purpose, exists for requiring more nominating signatures for a city-wide independent candidate or new political party than for a state-wide independent candidate or new political party.[16]

[16] In addition to violating the equal protection clause, the more burdensome signature requirements for independent candidates and new political parties seeking elective office in Chicago also violate the due process clause of the Fourteenth Amendment. *Zablocki v. Redhail*, 434 U.S. 374, 391-96 (1978) (Stewart, J., concurring); *Roe v. Wade*, 410 U.S. 113, 154-156 (1973), 167-171 (Stewart, J., concurring). State regulation of the nomination process affects the plaintiffs' fundamental rights and "liberties" protected by the due process clause. *Williams v. Rhodes, supra*, 393 U.S. at 30-31; *NAACP v. Alabama*, 357 U.S. 449, 460-461 (1958). Requiring more signatures on Chicago nominating petitions than the state requires on statewide petitions to meet the same state regulatory interests unnecessarily intrudes upon the plaintiffs' liberty interests. This intrusion violates the due process

(Footnote continued on following page)

C. This Court's Ruling In *Moore v. Ogilvie* Should Be Applied To This Case.

Section 10-2, one of the statutes challenged by *Rose*, was before this Court in *Moore v. Ogilvie*, 394 U.S. 814 (1969). At that time, Section 10-2 provided that independent candidates running for statewide office had to have nomination papers containing 25,000 signatures including "the signatures of 200 qualified voters from each of at least 50 counties." This Court invalidated the latter provision because (*Id.* at 818-19):

> "It is no answer to the argument under the Equal Protection Clause that this law was designed to require statewide support for launching a new political party rather than support from a few localities. This law applies a rigid, arbitrary formula to sparsely settled counties and populous counties alike, contrary to the constitutional theme of equality among citizens in the exercise of their political rights. The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.
>
> "Under this Illinois law the electorate in 49 of the counties which contain 93.4% of the registered voters may not form a new political party and place its candidates on the ballot. Yet 25,000 of the remaining 6.6% of registered voters properly distributed among the 53 remaining counties may form a new party to elect candidates to office. This law thus discriminates against the residents of the populous counties of the State in favor of rural sections. It, therefore, lacks the equality to which the exercise of political rights is entitled under the Fourteenth Amendment."

In *Communist Party of Illinois v. State Board of Elections*, 518 F.2d 517 (7th Cir. 1975), *cert. denied*, 423 U.S. 986 (1975), the *Moore* rationale was extended to strike down an amended version of Section 10-2 requiring that no more than 13,000 of the 25,000 signatures required of a new political party seeking to run candidates for statewide office could come from a single county. The court there stated (*Id.* at 522):

> "Assuming that a compelling need exists in Illinois to 'protect the integrity of its political processes from frivolous or fraudulent candidacies', *Bullock v. Carter*, 405 U.S. 134, 145, 92 S.Ct. 849, 857, 31 L.Ed.2d 92 (1972), we cannot see how this interest is tied by necessity to a discriminatory diminution of the power of the individual voter in Cook County, or any other urbanized county. Similarly, if there is a permissible and compelling state interest in limiting the total number of candidates or parties on the statewide ballot independent of the question of the seriousness or legitimacy of such candidates or parties, *some method is surely available which will serve this interest without making the effectiveness of an Illinois citizen's electoral power depend on his geographical location within that state.*" (Emphasis added.)

See also Communist Party of Illinois v. Ogilvie, 357 F. Supp. 105 (N.D. Ill. 1972).

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[16] *continued*
clause because it is overbroad. The state requirement of 25,000 signatures presents an adequate and viable alternative which is more narrowly drawn. Thus, only the 25,000 signature requirement should be imposed here. *See Zablocki, supra*, at 394 (Stewart, J., concurring); *Roe, supra*, at 155; *NAACP v. Alabama*, 377 U.S. 288, 307-08 (1963).

Moreover, the circumstances relating to the Special Mayoral Election, particularly the limited amount of time available to gather the necessary signatures, rendered the application of the 5% requirement in this case overburdensome and impermissible under the First Amendment. *See Storer v. Brown, supra*, 415 U.S. at 742. This is an independent basis for affirmance.

Under Sections 10-2 and 10-3, 25,000 voters (wherever located in the state) can form a new political party or support an independent candidate for any statewide office. For example, 25,000 voters in Chicago could form a new political party, and secure general election ballot position for their candidates for United States Senator, Governor and other state officers. This new political party would be represented on every voting machine and every paper ballot in the State of Illinois, including the City of Chicago and Cook County. This same group of 25,000 voters, however, could not place a slate of candidates on the City of Chicago general election ballot for Mayor, Clerk and Treasurer since more than 35,000 signatures would be required. For Cook County offices, over 100,000 signatures would be required. Such a result is prohibited by *Moore v. Ogilvie.*

The decisions of the courts below should be affirmed.

II.

THIS COURT'S SUMMARY AFFIRMANCE IN *JACKSON v. OGILVIE* DID NOT PRECLUDE THE COURTS BELOW FROM REACHING THE MERITS OF THIS CASE.

The district court properly determined that this Court's summary affirmance in *Jackson v. Ogilvie*, 325 F. Supp. 864 (N.D.Ill. 1971), *summarily aff'd.*, 403 U.S. 925 (1971) did not preclude the court from reaching the merits of plaintiffs' equal protection claim. A summary affirmance is binding on lower courts only as to the "precise issues presented and necessarily decided" by this Court's summary action. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Because the equal protection question at issue in this case was neither raised in *Jackson* nor decided by this Court's summary affirmance, the district court was not precluded from reaching the merits of plaintiffs' equal protection challenge.

A. The Equal Protection Question At Issue In This Case Was Neither Raised Nor Decided In *Jackson v. Ogilvie.*

A review of the complaint, the district court opinion and the jurisdictional statement in *Jackson* demonstrates that the equal protection question at issue in this case was not presented to, or decided by, the three-judge court in *Jackson*, and it was not raised before or decided in this Court.[17]

In 1970, the Rev. Jesse Jackson attempted to run for Mayor of Chicago as an independent candidate. Jackson was required by the 5% rule in Section 10-3 to obtain approximately 58,000 signatures on his nominating petitions. *Jackson, supra*, 325 F. Supp. at 866. Jackson filed suit challenging, *inter alia*, the signature requirement.

Jackson's complaint, however, relied upon legal theories other than the one at issue before this Court. Jackson maintained that the 5% requirement in Section 10-3 invidiously discriminated against independent candidates in favor of candidates of established political parties. The majority of the three-judge court postulated the equal protection question at issue in *Jackson* as follows (*Id.* at 868.):

> ". . . under the equal protection measure we must determine whether [the 5%] requirement operates to discriminate against the plaintiff by depriving him of a right granted to candidates of established political parties."

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[17] For the Court's convenience, the jurisdictional statement filed in *Jackson* has been reprinted and is submitted herewith as Appendix C.

Noting that established party candidates were forced not only to secure nominating signatures but also to undergo the rigors of party nominating primaries, the majority of the three-judge court concluded that the collective barriers to ballot placement for candidates of established parties placed them "on an equal footing" with independents. *Id.* at 869. Thus, as between independents and traditional party candidates, Section 10-3 did not violate the equal protection clause.

The equal protection attack on Sections 10-2 and 10-3 in this case is completely different from the one made in *Jackson*. Rose's claim is not based on any alleged discrimination between the treatment afforded candidates of established parties and independent candidates. Rather, Rose's claim focuses on the dissimilar treatment afforded independent candidates and new political parties seeking office in the City of Chicago as compared to the treatment afforded the very same persons and parties seeking statewide office.

The equal protection question presented here was not in issue in *Jackson*. The complaint in *Jackson* made no reference to the 25,000 signature requirement for statewide offices. Neither the majority nor the dissenting opinions of the three-judge court made reference to this question. Moreover, the issue was not presented in the jurisdictional statement filed on behalf of Jackson in this Court.[18]

[18] In fact, in his jurisdictional statement, Jackson set forth the portion of Section 10-3 "applicable" to his case, but did not even include the first sentence of the statute which contains the 25,000 signature requirement for statewide elections. (App. C, attached hereto, at 16a-17a.) Thus, in *Jackson*, this Court was not even provided with a reference to the statutory classification which is now at issue in this case.

B. Summary Affirmances By This Court Bind The Lower Courts Only As To The Precise Issues Presented And Necessarily Decided By This Court's Action.

The State Board's assertion that the doctrine of *stare decisis*,[19] as represented by this Court's summary affirmance in *Jackson v. Ogilvie*, should have precluded the courts below from reaching the merits of the current challenge to Sections 10-2 and 10-3 is untenable in light of this Court's recent opinions in *Hicks v. Miranda*, 422 U.S. 332 (1975) and *Mandel v. Bradley*, 432 U.S. 173 (1977). *Hicks* and *Mandel* define for the lower courts the precedential value of summary dispositions by this Court. Contrary to the State Board's suggestion, summary affirmances do not preclude lower courts from hearing challenges to statutes which are brought on different grounds than those summarily affirmed by this Court in a previous case.[20]

[19] The State Board's reliance on the "law of the case" doctrine is totally misplaced. It is fundamental that this doctrine applies only when the parties and issues are the same. *In re Peer Manor Bldg. Corp.*, 143 F.2d 769, 770 (7th Cir. 1944), *cert. denied*, 323 U.S. 757 (1944); *Champlin Refining Co. v. Comm'r. of Internal Revenue*, 123 F.2d 202, 204 (10th Cir. 1941); *Fidelity & Deposit Co. v. Port of Seattle*, 106 F.2d 777, 781 (9th Cir. 1939), *cert. denied*, 309 U.S. 661 (1940).

[20] The precedential weight of this Court's summary dispositions has been widely discussed. *See* Note, *The Precedential Effect of Summary Affirmances and Dismissals for Want of a Substantial Federal Question By the Supreme Court After Hicks v. Miranda and Mandel v. Bradley*, 64 Va. L. Rev. 117 (1978); Tushnet, *The Mandatory Jurisdiction of the Supreme Court—Some Recent Developments*, 46 Cin. L. Rev. 347, 365-67 (1977); Comment, *The Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some Implications of Hicks v. Miranda*, 76 Colum. L. Rev. 508 (1976); Note, *Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent*, 52 B. U. L. Rev. 373 (1972). Confusion relating to summary dispositions by this Court has provided one basis for the U. S. Senate's consideration of The Supreme Court Jurisdiction Act of 1978 (S. 3100, 95th Cong., 2nd Sess.), a bill which would remove much of the obligatory, appeal by right, jurisdiction of this Court. *See* S. Rep. No. 95-985 (95th Cong. 2d Sess.), 7-8 (July 13, 1978).

In *Hicks v. Miranda*, 388 F. Supp. 350 (C.D. Cal. 1974), *rev'd*, 422 U.S. 332 (1975), a three-judge court had declared California's obscenity statute unconstitutional. The three-judge court stated that it did not consider itself bound by this Court's summary dismissal of a prior appeal from a state appellate court decision upholding the constitutionality of the same statute. *Miller v. California*, 418 U.S. 915 (1974) ("*Miller II*").

This Court ruled in *Hicks* that the district court erred in holding that it could disregard the decision in *Miller II*. *Hicks*, *supra* at 343. However, the mere fact of the summary disposition in *Miller II* was not dispositive. As Mr. Justice White noted (*Id.* at 345 n.14):

> "Of course, *Miller II* would have been decisive here only if the issues in *Miller II* and the present case were sufficiently the same that *Miller II* was a controlling precedent. Thus, had the District Court considered itself bound by summary dismissals of appeals by this Court, its initial task would have been to ascertain what issues had been properly presented in *Miller II* and declared by this Court to be without substance."

This Court applied the *Hicks* doctrine in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). In *Usery*, plaintiffs alleged that various provisions of the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. § 901 et seq., as amended) were unconstitutional. A three-judge court rejected most of plaintiffs' challenges but found two provisions of the Act unconstitutional.

On appeal to this Court, the government asserted that the district court should not have decided the constitutional questions because of this Court's summary affirmance in *National Independent Coal Operators Ass'n. v. Brennan*, 372 F. Supp. 16 (D.D.C. 1974), *summarily aff'd*, 419 U.S. 955 (1974). However, this Court rejected this argument because the "summary affirmance in

[*Brennan*] did not foreclose the District Court's determination of unconstitutionality regarding [the two provisions in question], those issues not having been before us on the appeal." *Usery*, *supra*, at 14.[21]

In *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975), this Court criticized the district court for its overly-strict adherence to this Court's summary affirmance in *Torres v. New York State Dept. of Labor*, 405 U.S. 949 (1972). According to Mr. Justice Powell, the Court erred by reading the summary affirmance in *Torres* "at its broadest." (*Id.* at 388-89 n.15) This Court concluded (*Id.*):

> "We do not undertake to identify the combination of factors that justify the *Torres* decision. Having once decided the case summarily, we decline to do so again. We only indicate that the District Court should not have felt precluded from undertaking a more precise analysis of the statutory issue than it felt empowered to do in this case."

In a concurring opinion, Mr. Chief Justice Burger stated (*Id.*, at 391-92):

> "When we summarily affirm, without opinion, the judgment of a three-judge court we affirm the judgment but not necessarily the reasoning by which it was reached. An unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument."

See also Pressler v. Blumenthal, 434 U.S. 1028, 1028-29 (1978) (Rehnquist, J., concurring.)

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[21] Similarly, in *McCarthy v. Philadelphia Civil Service Comm'n.*, 424 U.S. 645, 646 (1976), the Court noted that summary affirmances in two prior cases rejecting due process and equal protection challenges to ordinances requiring firemen to live in the city in which they worked did not preclude consideration of McCarthy's claim that a similar ordinance violated his fundamental right to travel.

In *Mandel v. Bradley*, 432 U.S. 173 (1977), this Court expanded upon its statements in *Hicks* and *Fusari* and more fully defined the precedential value for lower courts of this Court's summary dispositions (*Id.* at 176):

> "Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions. Summary actions, however, . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved."

In *Mandel*, plaintiffs challenged an early filing deadline for independent candidates seeking statewide and federal offices. The early filing deadline was similar to one found unconstitutional in *Tucker v. Salera*, 399 F. Supp. 1258 (E.D. Pa. 1975), *summarily aff'd.*, 424 U.S. 959 (1976). The district court in *Mandel* ruled that the early filing deadline was unconstitutional because "*Salera* decides the issue before us, and as the latest expression of the Supreme Court, we are bound to follow it." *Mandel*, at 176-77.

This Court noted, however, that the statute at issue in *Salera* provided that the necessary signatures had to be obtained during a limited 21-day period. No such limitation was contained in the Maryland statute at issue in *Mandel*. Because the statute in *Salera* was sufficiently distinguishable from the one in *Mandel*, this Court ruled that the district court erred in concluding that it was bound by the summary affirmance in *Salera*. This Court remanded the case for a full examination of the merits of plaintiffs' claim.

In a concurring opinion, Mr. Justice Brennan restated his view (previously expressed in his dissent from the denial of certiorari in *Colorado Springs Amusements, Ltd. v. Rizzo*, 428 U.S. 913, 923 (1976)) that a lower federal court should give "appropriate, but not necessarily conclusive, weight to our summary dispositions." Commenting on the per curiam opinion in *Mandel*, Mr. Justice Brennan stated (432 U.S. at 179-80):

> "The Court by not relying on our summary affirmance in *Tucker v. Salera*, 424 U.S. 959 (1976), and *Auerbach v. Mandel*, 409 U.S. 808 (1972), effectively embraces [the position expressed by Justice Brennan in *Colorado Springs*], and vividly exposes the ambiguity inherent in summary dispositions and the nature of the detailed analysis that is essential before a decision can be made whether it is appropriate to accord a particular summary disposition precedential effect. After today, judges of the state and federal systems are on notice that, before deciding a case on the authority of a summary disposition by this Court in another case, they must (a) examine the jurisdictional statement in the earlier case to be certain that the constitutional questions presented were the same and, if they were, (b) determine that the judgment in fact rests upon decision of those questions and not even arguably upon some alternative non-constitutional ground. The judgment should not be interpreted as deciding the constitutional questions unless no other construction of the disposition is plausible. In other words, after today, 'appropriate, but not necessarily conclusive, weight' is to be given this Court's summary dispositions."

The majority opinion and Mr. Justice Brennan's concurring opinion in *Mandel* both make it clear that the courts below should not have considered themselves bound by this Court's summary affirmance in *Jackson* unless the issue before the courts was necessarily decided by this Court's summary action in that case. In fact, even if this Court had granted full plenary review in *Jackson*, this Court's decision would not have been binding on the lower federal courts except as to those issues raised and decided by this Court. *See Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 376, 386 (1960).

C. The District Court Properly Applied The *Hicks* Doctrine.

The district court in the case at bar made precisely the analysis required by *Mandel, Fusari, Usery* and *Hicks.* The court concluded (J. S. App. at 36a):

> "The court has great respect for the principle of *stare decisis* but is not bound by previous cases where different facts are alleged and where new and persuasive arguments are raised."

The district court properly held that this case was factually and legally distinguishable from *Jackson* and that this Court's summary affirmance in *Jackson* therefore did not dispose of the equal protection claim presented in this case.

The State Board does not contend that the three-judge court in *Jackson* decided the equal protection question presented in this case. The State Board contends, however, that the issue was raised in one brief filed in the district court in *Jackson* and that therefore *Jackson* is dispositive. (Appellant's Brief, at 15.) The State Board's reference is to the following passage in the brief filed by one of several defendants[22] in *Jackson*:

> "It must also be remembered that it is even more difficult for an independent candidate to obtain signatures. Yet a whole new State political party needs only 25,000 signatures throughout the entire State for State offices, (section 10-2), while a single independent candidate for only the office of Mayor of Chicago, needs almost 60,000 signatures. This also is an invidious discrimination against one seeking the office of Mayor of Chicago."

The State Board's contention is that, because of this one passage in the entire *Jackson* file, the district court in

[22] In *Jackson*, the defendants included members of the Chicago Board of Election Commissioners and members of the State Electoral Board, a predecessor of the State Board of Elections. The brief filed by the State Electoral Board in *Jackson* is submitted herewith as Appendix D.

the case at bar was precluded from reaching the merits of Rose's equal protection claim. This argument should be rejected for two reasons.

First, the equal protection question in this case is not the same as the contention raised in the defendants' brief in *Jackson.* The assertion in *Jackson* was that Section 10-3 was unconstitutional because it imposed more rigorous signature requirements on independent candidates than new political parties were forced to meet under Section 10-2.[23] That is not the claim made by the plaintiffs in this case.

More importantly, the State Board's contention overlooks this Court's ruling that a summary disposition is decisive only as to the "precise issues presented and necessarily decided" by this Court's action. *Mandel, supra* at 176. Even assuming *arguendo* that the equal protection question at issue here was presented to the district court in *Jackson,* it was not presented to or decided by this Court in that case.[24] Because the equal protection question now before this Court was not presented to or decided by this Court in *Jackson,* the

[23] Review of Sections 10-2 and 10-3 demonstrates that independent candidates and new political parties are, in fact, treated identically by the statutes. Both are forced to gather more signatures to attain ballot access in Chicago and Cook County elections than they must gather for ballot access in elections for statewide offices. The classification at issue in this case was not even referred to by any of the parties in *Jackson.*

[24] While it is true that the brief filed by the State Electoral Board was referred to in the jurisdictional statement filed in *Jackson* (Appendix C, attached hereto, at 19a), it can hardly be said that this "properly presented" the equal protection question at issue in this case. *Hicks, supra,* at 354 n.14. *Cf., Quilloin v. Wolcott,* 434 U.S. 246, 253 n.13 (1978); *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment,* 347 U.S. 590, 597 n.14 (1954); S.Ct. Rule 15(1)(c).

summary affirmance in *Jackson* was of no precedential weight in this case.[25] The district court properly considered the merits of plaintiffs' equal protection claim and properly ruled in plaintiffs' favor.

This Court should affirm.

III.

THE COURT OF APPEALS PROPERLY HELD THAT THE ISSUE OF THE PROPRIETY OF THE MARCH 17 ORDER WAS MOOT.

The order entered by the district court on March 17, 1977, lowering the signature requirement to 20,000 and extending the filing date two weeks beyond the statutory deadline, expressly provided that its effect would be "solely as applied to the Special Mayoral Election to be held in Chicago on June 7, 1977." (App. 74.) The Chicago Board agreed to the entry of this order, but the State Board objected to the order.

The State Board maintained in the court of appeals that the Chicago Board did not have the authority to enter into any agreement to settle this case without the State Board's approval. However, this issue was moot by the time it reached the court. The election had passed. Gerald Rose had obtained the 20,000 signatures required by the March 17 order and had secured a place on the ballot. Thus, the authority of the Chicago Board to agree to the March 17 order without the State Board's prior approval could no longer effectively be challenged and no relief was possible. The issue was clearly moot.

[25] Even assuming *arguendo* that the district court was somehow bound by this Court's summary affirmance in *Jackson*, this Court would still be free to, and should, re-evaluate the *Jackson* decision. *Edelman v. Jordan*, 415 U.S. 651, 671 (1974); *Fusari v. Steinberg*, 419 U.S. 379, 392 (1975) (Burger, C.J., concurring).

Moreover, the district court's order did not present a factual situation similar to those presented in cases in which this Court has found an exception to the mootness doctrine because the issue presented, though otherwise moot, was "capable of repetition yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).

A. The "Capable Of Repetition Yet Evading Review" Doctrine Requires A Showing On The Record That The Issue Presented Is Likely To Be Repeated In The Future.

In *Southern Pacific Terminal, supra*, the Interstate Commerce Commission utilized a device by which its orders could effectively escape review by the federal courts. The ICC repeatedly issued short-term orders which would expire before judicial review was possible. This Court held that, although each order presented a moot issue, the validity of these orders could be collectively reviewed by the courts. *Id.* at 515-16. The justification was that the ICC was continuing to issue these orders and the orders were thus "capable of repetition yet evading review." *Id.* at 515.

In *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975), this Court articulated the two factual prerequisites which appellants like the State Board must establish in order to satisfy the "capable of repetition yet evading review" exception to the mootness doctrine:

> "(1) the challenged action [must be] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [must be] a reasonable expectation that the same complaining party [will] be subjected to the same action again."

Appellees concede that the first prong of this test was satisfied in this case. With the filing deadline past and the Special Election only a few weeks away, it would

have been impossible to obtain full appellate review of the Chicago Board's authority to settle this case.

However, the State Board has not satisfied the second prong of the *Weinstein* test. The State Board has not demonstrated that the issue presented by the Chicago Board's settlement may reasonably be expected to recur in the future. Certainly, the "reasonable expectation" requirement set forth in *Weinstein* is not satisfied by an appellant's mere conclusory assertion that the issue is capable of repetition. This prong of the "capable of repetition yet evading review" test must be satisfied by a factual showing that there is a likelihood of repetition. Thus, this Court properly recognized in *Commercial Cable Co. v. Burleson*, 250 U.S. 360, 362 (1939) that mere "anticipations of possible [governmental action] afford no basis for the suggestion that the cases now present any possible subject for judicial action, and hence it results that they are wholly moot and must be dismissed for that reason." Where, as here, appellant's fear of recurrence is "merely . . . speculative," *Street Employees Div. 1287 v. Missouri*, 374 U.S. 74, 78 (1963), the "capable of repetition yet evading review" doctrine should not be applied.

The extent to which parties must establish on the record that an otherwise moot issue is "capable of repetition yet evading review" was precisely the issue recently before this Court in *SEC v. Sloan*, ... U.S. ....., 98 S.Ct. 1702 (1978). There, the SEC urged that the record was insufficient to determine whether the issue raised—involving SEC trading suspension orders—was likely of repetition. The SEC sought remand for further hearings to establish whether repetition was likely. This Court thoroughly reviewed the record and found a factual basis for the proposition that the issue was likely to be raised in the future. 98 S.Ct. at 1707-08 n. 5. No such finding is possible from the record in this case. Yet such a factual finding necessarily underlies every case

in which the " capable of repetition yet evading review" doctrine has been applied to governmental action.[26]

These cases have rested upon evidence that, because of past, similar conduct and a policy of continuing that conduct, a "reasonable expectation" exists that the same governmental conduct will recur in the future. The record here does not reveal prior and repeated similar episodes which have evaded review. The State Board does not claim that the Chicago Board ever before attempted to settle litigation without the State Board's approval. Nor does the record reveal a likelihood of future unilateral settlements by the Chicago Board. The Chicago Board has no policy favoring settlements contrary to the State Board's wishes. The record clearly indicates, by the language of the order (App. 74), that the Chicago Board wishes to avoid any future precedential application of the March 17 order.

The State Board failed to establish to the satisfaction of the court of appeals that the Chicago Board's settlement conduct is likely to recur, and the court properly ruled that the matter was moot.

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[26] In *United States v. N. Y. Tel. Co.*, 434 U.S. 159, 165 n.6 (1977), for example, this Court had before it a record reflecting "the [telephone] Company's policy of refusing to render voluntary assistance in installing pen registers and the Government's *determination to continue* to utilize them . . . ." (Emphasis added.) In *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974), "[p]etitioner employer was engaged in *cyclically recurring* bargaining with the union representing its employees, and respondent state official was *continuously following* a policy of paying unemployment compensation benefits to strikers." *Weinstein v. Bradford, supra*, 423 U.S. at 148. (Emphasis added.) The pattern established in *Super Tire* reflected a "fixed and definite" governmental policy likely to be effectuated in future strikes. 416 U.S. at 124.

B. The Fact That This Case Involves An Election Does Not, In And Of Itself, Justify The Use Of The "Capable Of Repetition Yet Evading Review" Doctrine.

The State Board suggests that even though the two-prong test of the "capable of repetition yet evading review" doctrine has not been satisfied here, this doctrine should nevertheless be applied in any election situation. In support of this theory, the State Board cites *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969). (Appellant's Brief at 19.)

It is true that this Court has applied the "capable of repetition yet evading review" exception to the mootness doctrine in several election cases to enable it to review legal issues arising in the context of a specific election even when the election has passed.[27] However, in each of those cases, the issue presented was the constitutionality of a statute which would continue to control future elections. The issue here is whether the Chicago Board had statutory authority to settle this case. The basis for hearing the other election-related cases was the same as in the non-election cases—there was a clear, factual likelihood that the issue would recur in the future. No such likelihood has been established here.

Moreover, even if the issue were to recur, the State Board would be able to press its claim at that time. If the State Board is correct that the Chicago Board has no discretion to settle federal court litigation, the State Board could secure an original writ of mandamus in the

[27] *Moore v. Ogilvie, supra; First National Bank of Boston v. Bellotti, supra,* at 1414-15 (1978); *Storer v. Brown, supra,* at 737 n.8 (1974); *American Party of Texas v. White, supra,* at 770 n.1 (1974); *Brown v. Chote,* 411 U.S. 452, 457 n.4 (1973); *Rosario v. Rockefeller, supra,* at 756 n.5 (1973); *Dunn v. Blumstein, supra,* at 333 n.2 (1972).

Illinois Supreme Court[28] or in the Circuit Court of Cook County.[29]

Thus, this case presents a situation much like the one presented in *DeFunis v. Odegaard*, 416 U.S. 312 (1974). There, this Court recognized that "just because this particular case did not reach the Court [before circumstances rendered it moot] it hardly follows that the issue [appellant] raises will in the future evade review." *Id.* at 319.

If, in the future, it ever becomes apparent that the Chicago Board intends to enter into settlement negotiations against the will of the State Board, then the State Board may object to that practice. However, on this record, the court of appeals properly recognized that the issue of the Chicago Board's authority to settle a single, unique, non-precedential matter arising in the context of a special election did not appear to be "capable of repetition yet evading review", but was, in fact, moot.

Any finding to the contrary would have resulted in a decision in excess of the jurisdiction of the court of appeals:

> "The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy. As the Court noted in *North Carolina v. Rice*, 404 U.S. 244, 246 (1971), a federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.' Its judgments must resolve a real and substantial controversy admitting of specific relief, through a decree of a conclusive character, as distinguished from an opinion

[28] Ill. Rev. Stat., Ch. 37, § 13. *See Lewis v. Dunne,* 63 Ill.2d 48, 344 N.E.2d 443 (1976); *Touhy v. State Board of Elections,* 62 Ill.2d 303, 342 N.E.2d 364 (1976).

[29] Ill. Rev. Stat., Ch. 37, § 72.25. *See Reynolds v. Conti,* 132 Ill. App. 2d 505, 270 N.E.2d 505 (1971); *People ex rel. Stoffel v. Town of Cicero,* 404 Ill. 432, 89 N.E.2d 350 (1949).

advising what the law would be upon a hypothetical state of facts." (Citations omitted.)

Preiser v. Newkirk, 422 U.S. 395, 401 (1975).

For the court of appeals to have determined the relative authority of the Chicago Board and the State Board for future elections in which no dispute may exist, would have resulted in just such an advisory opinion.

C. Even If The Issue Of The Chicago Board's Authority To Settle Litigation Was Not Moot, This Court Should Not Decide The Merits Of The Issue.

Assuming *arguendo* that the issue of the authority of the Chicago Board to enter into the March 17 agreement was not moot but, in fact, retained some vitality before the court of appeals, the question of the Chicago Board's authority to settle litigation certainly should not be considered by this Court in the first instance.

The question of the relationship between the Chicago Board and the State Board is a question of first impression and was not briefed by the parties in the court of appeals. The Illinois state courts have not had an opportunity to resolve this issue, nor has any federal court considered it.

Any determination of the relationship between the Chicago Board and the State Board will ultimately involve construction of several Illinois constitutional and statutory provisions.[30]

[30] Ill. Const., Art. III, § 3 (1970) provides: "All elections shall be free and equal."

Ill. Const., Art. III, § 5 (1970) provides: "A State Board of Elections shall have general supervision over the administration of the registration and election laws throughout the State."

(Footnote continued on following page)

Construction of these provisions may also involve a review of the local government "Home Rule" provisions of the 1970 Illinois Constitution, Ill. Const., Art. VII (1970), the application of Illinois common law to the effect that governmental bodies have implied powers in aid of their jurisdiction and to effectuate their statutory purposes, *Owens v. Green*, 400 Ill. 380, 400, 81 N.E.2d 149, 160 (1948), and the rule that a governmental body has implied authority to settle litigation in the public interest. *People ex rel. Ammann v. Dipper*, 392 Ill. 38, 43-44, 63 N.E.2d 870, 873 (1945); *Agnew v. Brall*, 124 Ill. 312, 315, 16 N.E. 230, 231 (1888).

This Court is certainly not required to undertake in the first instance such a searching analysis of Illinois law. Rather, the parties should be permitted to fully brief and argue this issue below. As this Court stated in *Singleton v. Wulff*, 428 U.S. 106, 120 (1976):

> "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. In *Hormel v. Helvering*, 312 U.S. 552, 556 (1941), the Court explained that this is 'essential in order that parties may have the opportunity to offer all the evidence they believe relevant

[30] *continued*

Ill. Rev. Stat., Ch. 46, § 1A-1 provides:

"A State Board of Elections is hereby established which shall have general supervision over the administration of the registration and election laws throughout the State, and shall perform only such duties as are or may hereafter be prescribed by law."

Ill. Rev. Stat., Ch. 46, § 6-26 provides:

". . . [Municipal boards of election commissioners] shall, except as otherwise provided in this Section, have charge of and make provisions for all elections, general, special, local, municipal, state and county, and all others of every description to be held in such city or any part thereof, at any time, or in such village or incorporated town, as the case may be. . . ."

> to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.' We have no idea what evidence, if any, petitioner would, or could, offer in defense of this statute, but this is only because petitioner has had no opportunity to proffer such evidence. Moreover, even assuming that there is no such evidence, petitioner should have the opportunity to present whatever legal arguments he may have in defense of the statute."

Cf. Pinkus v. United States, ... U.S. ....., 98 S.Ct. 1808, 1815 (1978).

In the event that this Court concludes that the court of appeals erred when it dismissed the State Board's appeal from the March 17 order as moot, this Court should remand this question for further determination of whether or not the Chicago Board had the requisite authority to negotiate and consent to the March 17 order.

Of course, the question of the respective authority of the State Board and the Chicago Board would be more properly heard in the state courts than in the district court. As Mr. Justice Douglas stated in his concurring comments to the denial of emergency relief in *Jackson v. Ogilvie*, 401 U.S. 904 (1971):

> "While these issues are by our federal standard 'justiciable,' federal courts are usually less able than state courts to work their way through a maze of state electoral laws."

This Court has recently observed that:

> "In a federal system, it is obviously desirable that questions of law which . . . are both intensely local and immensely important to a wide spectrum of state government activities be decided in the first instance by state courts."

Elkins v. Moreno, ... U.S. ....., 98 S.Ct. 1338, 1348 n.16 (1978). In *Elkins*, this Court availed itself of a statutory certification procedure to permit the Court of Appeals of Maryland to construe Maryland Law. Illinois does not have a certification procedure. However,

> "when state law does not make the certification procedure available, a federal court not infrequently will stay its hand, remitting the parties to the state court to resolve the controlling state law. . . ."

Lehman Brothers v. Schein, 416 U.S. 386, 390 (1974). In *American Trial Lawyers Ass'n., New Jersey Branch v. New Jersey Supreme Court*, 409 U.S. 467, 469 (1972), for example, this Court noted that the relationship between the parties was "extremely delicate." As a consequence, this Court remanded the case to the district court with instructions to stay its proceedings pending a determination of the state law questions in the state court. *See also Reetz v. Bozanich*, 397 U.S. 82, 85-87 (1970).

Accordingly, if this Court deems it necessary to remand the question of the Chicago Board's authority to agree to the March 17 order, it should do so, following the logic in *American Trial Lawyers, supra*, with instructions that the district court retain jurisdiction but stay federal proceedings pending further litigation in the Illinois state courts.

CONCLUSION

For the reasons stated above, it is respectfully requested that the decision of the United States Court of Appeals for the Seventh Circuit be affirmed.

Respectfully submitted,

JEFFREY D. COLMAN
JAYNE W. BARNARD
JENNER & BLOCK
One IBM Plaza - Suite 4300
Chicago, Illinois 60611
(312) 222-9350

WILLIAM H. LUKING
ROSS, HARDIES, O'KEEFE, BABCOCK & PARSONS
One IBM Plaza - Suite 3100
Chicago, Illinois 60611
(312) 467-9300

Counsel for Appellees,
Gerald Rose,
U.S. Labor Party, et al.

August 28, 1978

APPENDIX

APPENDIX A

Ill. Rev. Stat., Ch. 46, § 10-2. "Political party" and "established party" defined—Formation of new party—Petition—Provisional organization—Committeemen

The term "political party", as hereinafter used in this Article 10, shall mean any "established political party" as hereinafter defined and shall also mean any political group which shall hereafter undertake to form an established political party in the manner provided for in this Article 10: Provided, that no political organization or group shall be qualified as a political party hereunder, or given a place on a ballot, which organization or group is associated, directly or indirectly, with Communist, Fascist, Nazi or other un-American principles and engages in activities or propaganda designed to teach subservience to the political principles and ideals of foreign nations or the overthrow by violence of the established constitutional form of government of the United States and the State of Illinois.

A political party which, at the last general election for State and county officers, polled for its candidate for Governor more than 5% of the entire vote cast for Governor, is hereby declared to be an "established political party" as to the State and as to any district or political subdivision thereof.

A political party which, at the last election in any congressional district, legislative district, county, township, school district, park district, municipality or other district or political subdivision of the State, polled more than 5% of the entire vote cast within such congressional district, legislative district, county, township, school district, park district, municipality, or other political subdivision of the State, where such district, political subdivision or municipality, as the case may be, has voted as a unit for the election of officers to serve the respective territorial area

of such district, political subdivision or municipality, is hereby declared to be an "established political party" within the meaning of this Article as to such district, political subdivision or municipality.

Any group of persons hereafter desiring to form a new political party throughout the State, or in any political subdivision greater than a county and less than the State, shall file with the State Board of Elections a petition, as hereinafter provided; and any such group of persons hereafter desiring to form a new political party, in any county shall file such petition with the county clerk; and any such group of persons hereafter desiring to form a new political party in any municipality or district less than a county shall file such petition with the clerk or Board of Election Commissioners of such municipality or district, as the case may be. Any such petition for the formation of a new political party throughout the State, or in any such district or political subdivision, as the case may be, shall declare as concisely as may be the intention of the signers thereof to form such new political party in the State, or in such district or political subdivision; shall state in not more than 5 words the name of such new political party; shall at the time of filing contain a complete list of candidates of such party for all offices to be filled in the State, or such district or political subdivision as the case may be, at the next ensuing election then to be held; and, if such new political party shall be formed for the entire State, shall be signed by not less than 25,000 qualified voters: Provided, that no more than 13,000 signatures from the same county may be counted toward the required total of 25,000 signatures. If such new political party shall be formed for any district or political subdivision less than the entire State, such petition shall be signed by qualified voters equaling in number not less than 5% of the number of voters who voted at the next preceding general election in such district or political subdivision in which such district or political subdivision voted as a unit for the election of officers to serve its respective territorial area.

The filing of such petition shall constitute the political group a new political party, for the purpose only of placing upon the ballot at such next ensuing election such list or an adjusted list in accordance with Section 10-11, of party candidates for offices to be voted for throughout the State, or for offices to be voted for in such district or political subdivision less than the State, as the case may be, under the name of and as the candidates of such new political party.

If, at such ensuing election, the new political party's candidate for Governor shall receive more than 5% of the entire votes cast for Governor, then such new political party shall become an "established political party" as to the State and as to every district or political subdivision thereof. If, at such ensuing election, the other candidates of the new political party, or any other candidate or candidates of the new political party shall receive more than 5% of all the votes cast for the office or offices for which they were candidates at such election, in the State, or in any district or political subdivision of the State, as the case may be, then and in that event, such new political party shall become an "established political party" within the State or within such district or political subdivision less than the State, as the case may be, in which such candidate or candidates received more than 5% of the votes cast for the office or offices for which they were candidates. It shall thereafter nominate its candidates for public offices to be filled in the State, or such district or political subdivision of the State, as the case may be, under the provisions of the laws regulating the nomination of candidates of established political parties at primary elections and political party conventions, as now or hereafter in force.

A political party which continues to receive for its candidate for Governor more than 5% of the entire vote cast for Governor, shall remain an "established political party" as to the State and as to every district or political subdivision thereof. But if the political party's candidate for Governor fails to receive more than 5% of the entire vote

cast for Governor, or if the political party does not nominate a candidate for Governor, the political party shall remain an "established political party" within the State or within such district or political subdivision less than the State, as the case may be, only so long as, and only in those districts or political subdivisions in which, the candidates of that political party, or any candidate or candidates of that political party, continue to receive more than 5% of all the votes cast for the office or offices for which they were candidates at succeeding general elections within the State or within any district or political subdivision of the State, as the case may be.

Any such petition shall be filed at the same time and shall be subject to the same requirements and to the same provisions in respect to objections thereto and to any hearing or hearings upon such objections that are hereinafter in this Article 10 contained in regard to the nomination of any other candidate or candidates by petition. If any such new political party shall become an "established political party" in the manner herein provided, the candidate or candidates of such new political party nominated by the petition hereinabove referred to for such initial election, shall have power to select any such party committeeman or committeemen as shall be necessary for the creation of a provisional party organization and provisional managing committee or committees for such party within the State, or in any district or political subdivision in which the new political party has become established; and the party committeeman or committeemen so elected shall constitute a provisional party organization for the new political party and shall have and exercise the powers conferred by law upon any party committeeman or committeemen to manage and control the affairs of such new political party until the next ensuing primary election at which the new political party shall be entitled to nominate and elect any party committeeman or committeemen in the State, or in such district or political subdivision under any parts of this Act relating to the organization of political parties.

APPENDIX B

Ill. Rev. Stat., Ch. 46, § 10-3. Independent candidates—Nomination papers

Nomination of independent candidates (not candidates of any political party), for any office to be filled by the voters of the State at large may also be made by nomination papers signed in the aggregate for each candidate by not less than 25,000 qualified voters of the State; Provided, however, that no more than 13,000 signatures from the same county may be counted toward the required total of 25,000 signatures. Nominations of independent candidates for public office within any district or political subdivision less than the State, may be made by nomination papers signed in the aggregate for each candidate by qualified voters of such district, or political division, equaling not less than 5%, nor more than 8% (or 50 more than the minimum, whichever is greater) of the number of persons, who voted at the next preceding general election in such district or political sub-division in which such district or political sub-division voted as a unit for the election of officers to serve its respective territorial area. For the first election following a redistricting of congressional districts, nomination papers for an independent candidate for congressman shall be signed by at least 5,000 qualified voters of the congressional district. For the first election following a redistricting of legislative districts, nomination papers for an independent candidate for State Senator or Representative in the General Assembly shall be signed by at least 3,000 qualified voters of the legislative district. Each voter signing a nomination paper shall add to his signature his place of residence, and each voter may subscribe to one nomination for such office to be filled, and no more: Provided that the name of any candidate whose name may appear in any other place upon the ballot, shall not be so added by petition for the same office.

The person circulating the petition, or the candidate on whose behalf the petition is circulated, may strike any signature from the petition, provided that;

(1) the person striking the signature shall initial the petition at the place where the signature is struck; and

(2) the person striking the signature shall sign a certification listing the page number and line number of each signature struck from the petition. Such certification shall be filed as a part of the petition.

(3) the persons striking signatures from the petition shall each sign an additional certificate specifying the number of certification pages listing stricken signatures which are attached to the petition and the page numbers indicated on such certifications. The certificate shall be filed as a part of the petition, shall be numbered, and shall be attached immediately following the last page of voters' signatures and before the certifications of stricken signatures.

(4) all of the foregoing requirements shall be necessary to effect a valid striking of any signature. The provisions of this Section authorizing the striking of signatures shall not impose any criminal liability on any person so authorized for signatures which may be fraudulent.

In the case of the offices of Governor and Lieutenant Governor a joint petition including one candidate for each of those offices must be filed.

Every petition for nomination of an independent candidate for any office for which candidates of established political parties are nominated by primary shall be filed at the time designated in Section 7-12 of this Act in regard to the nomination by primary of any other candidate for such office.

APPENDIX C

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No. 1341

JESSE L. JACKSON, SHARON P. WILKINSON and MELVIN M. MACLIN,

Appellants,

v.

RICHARD OGILVIE, Governor of the State of Illinois and Chairman of the State Electoral Board of the State of Illinois, et al.,

Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

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JURISDICTIONAL STATEMENT

Robert L. Tucker
840 East 87th Street
Chicago, Illinois 60619
312 994-2600

Kermit B. Coleman
6 South Clark Street
Chicago, Illinois 60602
312 726-6180

Thomas N. Todd
357 East Chicago Avenue
Chicago, Illinois 60611
312 649-8431

Attorneys for Appellants

Oral Argument Requested

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No. 1341

JESSE L. JACKSON, SHARON P. WILKINSON and MELVIN M. MACLIN,

Appellants,

v.

RICHARD OGILVIE, Governor of the State of Illinois and Chairman of the State Electoral Board of the State of Illinois; WILLIAM J. SCOTT, Attorney General of the State of Illinois; JOHN LEWIS, Secretary of State, State of Illinois; CHARLES W. WOODFORD, Treasurer of the State of Illinois; MICHAEL J. HOWLETT, Auditor of Public Accounts of the State of Illinois; JAMES RONAN, Chairman of the Democratic Party State Central Committee of the State of Illinois; and VICTOR L. SMITH, Chairman of the Republican Party State Central Committee of the State of Illinois; in their individual capacities and as members of the State Electoral Board of the State of Illinois; JOHN C. MARCIN, City Clerk, City of Chicago, Illinois; STANLEY T. KUSPER, JR., Chairman and MARIE H. SUTHERS and FRANCIS P. CANARY, members of the Board of Election Commissioners of the City of Chicago, Illinois,

Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JURISDICTIONAL STATEMENT

Appellants, plaintiffs in the Court below, appeal from the Judgment and Memorandum of Decision of two of the members of a three judge court, one judge dissenting, in the United States District Court for the Northern District of Illinois, Eastern Division, entered on January 28, 1971; which Judgment and Memorandum of Decision denied to appellants herein, injunctive relief; upheld the constitutional validity of certain provisions of the Election Code of the State of Illinois, as amended, namely Ill. Rev. Stats., Chap. 46, Secs. 10-3; 10-4; 10-6 (1969), which statutes purport to set forth the percentage requirements for acquiring and filing signatures of qualified electors by an independent candidate (a candidate not a member of an established political party) who would have his name placed on the ballot for public office in the State of Illinois; the time requirement for the filing of such signatures on nominating papers; and defines those persons who are eligible to sign nominating papers; or petitions for independent candidates for public office in the State of Illinois. This appeal is prosecuted by Jesse L. Jackson, Sharon P. Wilkinson and Melvin M. Maclin, plaintiffs below and appellants herein, to review the said Judgment and Memorandum of Decision of the District Court majority, with one judge dissenting, which majority decision held the foregoing statutes to be constitutionally valid. These appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW

The opinion of two of the members of the three judge court of the Northern District of Illinois, Eastern Division, contained in a Memorandum of Decision of the majority of the Court, with dissent, copy of the Judgment Order, and appellants' Notice of Appeal are attached hereto as Appendix A. For the convenience of the Court, the Complaint, plaintiffs' Motion for Temporary

Restraining Order, Answers of certain Defendants to the Complaint filed by plaintiffs, Memorandum of Law filed by certain state officials, named as defendants, in support of the plaintiffs' request for injunctive and declaratory relief, and plaintiffs' Motion for Summary Judgment are attached hereto as Appendix B.

JURISDICTION

This suit was brought by these appellants, plaintiffs below, under Title 28, U.S.C., Secs. 1331, 1332, 1343(3) and (4), 2201, 2202, 2203, 2281, 2284; and the Constitution of the United States; and more particularly the First, Fourteenth and Fifteenth Amendments thereto. The suit was prosecuted to challenge the constitutional validity of certain sections of the Illinois Election Code of 1969 as amended, namely: Chap. 46, Secs. 10-3; 10-4; and 10-6, which provisions purport to set forth the requirements in terms of the number of signatures required on nominating papers for an independent candidate (not a candidate of any established political party), to get on the ballot for public office in the State of Illinois; set forth the time within which such independent candidate may so qualify by the filing of nominating petitions or papers; and defines those persons eligible to sign nominating papers for an independent candidate for public office in the State of Illinois. The complaint also questions the constitutional validity of these statutes as they are being applied to the plaintiffs herein. The Memorandum of Decision and Judgment Order of the Court, with one judge dissenting was entered on January 28, 1971.

The judgment entered below and the Memorandum of Decision, upheld the constitutional validity of the foregoing statutes; denied these appellants injunctive relief and dismissed the cause of action brought by these appellants. On February 1, 1971, appellants herein, plaintiffs below, filed their Notice of Appeal, seeking to

review the aforesaid Judgment of the United States District Court. The jurisdiction of the Supreme Court of the United States to review the decision by direct appeal is conferred by Title 28, U.S.C., Sec. 1253 and 2281. The following decisions of the Court also sustain jurisdiction to review the judgment on direct appeal in this case:

Moore v. Ogilvie, 394 U.S. 814 (1969).
Williams v. Rhodes, 393 U.S. 23 (1968).
Wesberry v. Sanders, 376 U.S. 1 (1963).
Baker v. Carr, 369 U.S. 186 (1962).
Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935).
Matthews v. Little, 399 U.S. 1223 (1969).

QUESTION PRESENTED

The question presented by this appeal is whether the majority on the three judge panel of the United States District Court for the Northern District of Illinois erred in denying to appellants herein, plaintiffs below, injunctive relief; upholding the constitutional validity of certain provisions of the Illinois Election Code challenged herein, namely; Ill. Rev. Stats., Chap. 46, Secs. 10-3; 10-4; 10-6, as amended (1969), and by ordering the dismissal of the cause of action filed by these appellants; and more particularly whether the provisions of the Illinois Election Code challenged herein, deny to these appellants, plaintiffs below, and qualified voters of the State of Illinois, the right to meaningfully participate in the total election process of the State of Illinois; deny to these plaintiffs the freedom of speech and of association as well as deny to them equal protection and due process of law, all being secured to appellants by the First, Fourteenth and Fifteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

Appellants herein, plaintiffs below, have caused the entire record in the trial court below to be docketed in this court. On December 10, 1970, appellants all being Black citizens of the United States, and of the State of Illinois, and further being qualified voters in the State of Illinois, filed their complaint in the United States District Court for the Northern District of Illinois, Eastern Division, against the defendants, Richard Ogilvie, in both his capacity as Governor and Chief Executive of the State of Illinois and as Chairman of the State Electoral Board; William J. Scott, Attorney General of the State of Illinois, in both his capacity as Chief law enforcement officer of the State of Illinois and as a member of the State Electoral Board; the remaining members of the State Electoral Board; City officials Stanley T. Kusper, Jr., Chairman and Marie H. Suthers and Francis P. Canary, members of the Board of Election Commissioners of the City of Chicago, Illinois, and John C. Marcin, City Clerk of the City of Chicago, Illinois.

Appellant, Jesse L. Jackson, seeks to qualify to have his name placed on the ballot as an independent candidate for the Office of Mayor of the City of Chicago, for election in the general election to be held on or about April 6, 1971. This appellant is not a member of any political party for the Office of Mayor of the City of Chicago, but as aforesaid, seeks to qualify as an independent candidate for said office.

Appellants, Sharon P. Wilkinson and Melvin M. Maclin, being duly qualified voters, assert their right to effectively participate in the total election process of the State of Illinois, and the City of Chicago, more particularly in support of the candidacy of Jesse L. Jackson as an independent candidate for the Office of Mayor of the City of Chicago. These appellants also seek to associate with other persons who would or might support the candidacy of appellant, Jesse L. Jackson, and

appellants Wilkinson and Maclin seek further to exercise their own rights of freedom of speech, association, petition and the right to effectively participate as voters in the total election process; such rights being secured to appellants under the First, Fourteenth and Fifteenth Amendments to the Constitution of the United States.

Specifically, appellants alleged in their complaint that the provisions of Ill. Rev. Stats., Chap. 46, Sec. 10-3; 10-4 and 10-6; invidiously discriminate against them in the lawful exercise of their federally protected rights to freedom of speech, association and the right to meaningfully and lawfully participate in the total election process of the State of Illinois; that the provisions of the aforesaid statutes challenged herein, because of the burdensome restrictions imposed by the State of Illinois upon independent candidates who seek to be placed on the ballot for public office, give established political parties of the State of Illinois and candidates who are the nominees of said parties, a decided and unconstitutional advantage over independent parties, as well as appellant, Jesse L. Jackson, in his effort to qualify to get on the ballot as an independent candidate for the Office of Mayor of the City of Chicago.

It was established on the hearing for a Temporary Restraining Order in the trial court below, and is not now disputed by any of the parties hereto, that in order to qualify under the provisions of Ill. Rev. Stats., Chap. 46, Sec. 10-3, to have his name placed upon the ballot for election to the Office of Mayor in the general election now scheduled to be held on April 6, 1971, an independent candidate, and appellant Jesse L. Jackson, in particular, would have to obtain on nomination petitions, valid signatures of not less than 58,000 and not more than 90,000 qualified voters in the City of Chicago; and said nominating petitions containing such required number of valid signatures of qualified voters would have to have been filed by the independent candidate on or before February 1, 1971.

It was also established in the trial court below, and not now disputed by any of the parties hereto, that the

candidates for the Office of Mayor of the established Democratic Party, in order to qualify to have his name placed on the ballot in the primary election, now scheduled for February 23, 1971, was required to obtain only 4,099 signatures of qualified primary electors of his party. The candidate for the same office put forth by the established Republican Party, in order to qualify to have his name placed on the ballot for the primary election of February 23, 1971, was required to obtain only 2,034 signatures of qualified electors of his party.

Defendants, Richard Ogilvie, in his capacity as Chief Executive of the State of Illinois; and William J. Scott, in his capacity as Attorney General and Chief law enforcement officer of the State of Illinois, filed their answers in the trial court below, admitting the material allegations of the complaint filed by the appellants. Specifically, these defendants, state officials, admit that the provisions of Ill. Rev. Stats., Chap. 46, Sec. 10-3, which set forth the higher signature requirement as to independent candidates, invidiously discriminate against appellant Jesse L. Jackson; and that the State of Illinois has no substantial or compelling interest which would justify the imposition of such burdensome and higher signature requirement upon an independent candidate for public office. These defendants, state officials, by their answer further admit that in this regard, Sec. 10-3 of the statutes challenged herein, deny to appellants Sharon P. Wilkinson and Melvin M. Maclin federally protected rights. Defendants Richard Ogilvie and William J. Scott, further filed in the trial court below their Memorandum of Law in support of plaintiffs' request for injunctive and declaratory relief, which Memorandum of Law has been designated as a part of the Record docketed in this Court for purposes of this appeal.

Defendant state officials who were named as members of the State Electoral Board of the State of Illinois, and each of them, filed their Motion to Dismiss as such members of the State Electoral Board on the ground that, *inter alia*, neither the State Electoral Board, nor its

members were proper or necessary parties to the lawsuit; and that no duty is imposed upon the State Electoral Board, or the members thereof, by any State Statute, relative to the primary or general election that is the subject of appellants' lawsuit.

Only the city officials, who are named as defendant, Stanley T. Kusper, Jr., Chairman and Marie H. Suthers and Francis P. Canary, members of the Board of Election Commissioners of the City of Chicago, filed answers to both the complaint and the appellants' Motion for Temporary Restraining Order, denying plaintiffs' allegations and further denying that plaintiffs were entitled to relief; and these defendants, city officials, subsequently filed their own Memorandum of Law in Opposition to Injunctive and Declaratory Relief.

On January 21, 1971, appellants herein, plaintiffs below, filed their Motion for Summary Judgment, which the trial court took under advisement, as the trial court had already set the entire matter for oral argument on Friday, January 22, 1971.

In the Memorandum of Decision filed in the court below on January 28, 1971, with one judge dissenting, all three members of the three judge District Court concurred in the findings that: appellants, plaintiffs below, had standing to sue; that the issues presented to the trial court were justiciable; that the matter was properly before the three judge District Court; and that the signature requirement for getting on the ballot for public office was higher in the State of Illinois than the percentage required in a majority of other states. However, the majority on the three judge District Court panel concluded that appellants' challenges to the provisions of the Illinois Election Code, Ill. Rev. Stats., Chap. 46, Secs. 10-3, 10-4, and 10-6, were without merit, denied appellants injunctive relief and ordered their cause dismissed (See majority and dissenting opinions—Appendix A). It is the judgment of the majority of the three judge court below from which this appeal has been respectfully taken.

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

The federal question presented by this appeal is indeed substantial. This court has had frequent and recent occasion to acknowledge and reaffirm the principals that, the right to vote for the candidate of one's choice; the right to have that vote count; the right of persons to associate for mutual political and social benefits; and the right to engage in speech and to petition the government, are well established fundamental elements of "LIBERTY", protected against state impairment by the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States. Indeed, this court has had most recent occasion to remind the State of Illinois that such fundamental rights may be limited only where there exists a compelling state interest in the regulation of a subject which is within the state's constitutional power to regulate. *Moore v. Ogilvie*, 394 U.S. 814 (1969); *Williams v. Rhodes*, 393 U.S. 23 (1968).

There is no dispute among the parties to this cause as to what the qualifying requirements are. With respect to the qualifying requirements of an independent candidate, defined by statute as one who is not a member of an established political party, Ill. Rev. Stats., Chap. 46, Sec. 10-3 provides, insofar as applicable as follows:

> ". . . Nominations of independent candidates for public office within any district or political subdivision less than the State, may be made by nomination papers signed in the aggregate for each candidate by qualified voters of such district or political division, equaling not less than 5%, nor more than 8% of the number of persons, who voted at the next preceding general election in such district or political subdivision in which such district or political subdivision voted as a unit for the election of officers to serve its respective territorial

> area; provided, that the maximum number of voters signing such petition may be increased to 25 whenever such amount is greater than the 8% limit hereinabove specified . . ."

The record in the trial court below shows, and all parties to this cause of action agree, that in order for the appellant, Jesse L. Jackson, to have qualified as an independent candidate for the Office of Mayor of the City of Chicago in the general election now scheduled for April 6, 1971, this appellant would have been required to have obtained and filed with the Board of Election Commissioners of the City of Chicago, Illinois, on or before February 1, 1971, not less than 58,000 nor more than 90,000 valid signatures of qualified voters who reside in the City of Chicago, Illinois. The record in the trial court below shows that no such burden is imposed upon candidates for the Office of Mayor who are members of an established political party. On the contrary, for purposes of getting on the ballot in the mayoralty primary now scheduled for February 23, 1971, the candidate for the established Democratic Party need to acquire and file only 4,099 signatures of qualified primary electors of his party. The candidate for the Office of Mayor put forth by the established Republican Party needed to acquire and file only 2,034 signatures of qualified primary electors of his party.

Appellant, Jesse L. Jackson, for himself, along with appellants Sharon P. Wilkinson and Melvin M. Maclin who support him, alleged in their complaint that appellant, Jesse L. Jackson, is a Black American, born to poverty and is now a person of limited financial means. It is alleged that this appellant, is without sufficient funds with which to hire the services of a corps of canvassers or political workers, and therefore, the said appellant had no practical, effective or realistic opportunity to acquire the requisite number of qualified or valid signatories on nomination papers within the restrictive and burdensome time frame imposed by the laws of the State of Illinois.

The time within which nominating papers for appellant Jackson must have been filed, is established by the provisions of Ill. Rev. Stats., Sec. 10-6, which insofar as is applicable provides as follows:

> ". . . Certificates of nomination and nomination papers for the nomination of candidates for the offices in cities, villages and incorporated towns shall be filed with the clerks of the cities, villages and incorporated towns at least 64 days previous to the day of such election, except that, in cities, villages and incorporated towns under the jurisdiction of a board of election commissioners, the certificates of nomination and nomination papers for the nomination of candidates for the offices in such cities, villages and incorporated towns shall be filed in the office of the board of election commissioners at least 64 days previous to the day of such election. Certificates of nomination and nomination papers for the nomination of candidates for the offices in townships shall be filed in the office of the clerk of the township at least 64 days previous to the day of such election, except that if the township is entirely within the corporate limits of a city, village or incorporated town under the jurisdiction of a board of election commissioners such certificates of nomination and nomination papers shall be filed in the office of the board of election commissioners instead of the clerk of the township, and if the township is partly within and partly without the corporate limits of a city, village or incorporated town under the jurisdiction of a board of election commissioners such certificates or a photostatic copy thereof of nomination and nomination papers shall be filed both in the Office of the Clerk of the township and in the office of the board of election commissioners. No certificates of nomination and nomination papers for the nomination of candidates for any of the aforesaid offices shall be filed with any such officer more than 99 days prior to the day of election. (Amended by Act approved May 22, 1967)."

The circumstances provoke the following inquiry: What valid compelling interest does the State of Illinois have in the premises as would justify the imposition upon one who would seek to qualify as an independent candidate for public office, such higher and greater burden than is imposed upon other candidates, and more particularly the candidates for the same office who are identified with or are members of established political parties? Extending this inquiry further, what valid compelling interest does the State of Illinois have in the premises as would justify the imposition of a standard of requirements upon those who would seek public office than is required by a huge majority of the remaining states in the United States? For a most persuasive answer to the foregoing inquiry, it is respectfully suggested that this court might properly look to and reasonably rely upon the responsive pleadings and the Memorandum of Law in support of appellants' request for injunctive and declaratory relief that was filed in the trial court below by Richard Ogilvie, Governor of the State of Illinois and William J. Scott, Attorney General of the State of Illinois, both of whom are named as defendants in this proceeding, and both of whom urged the trial court to be advised that the State of Illinois has no valid compelling interest in the premises as would justify the imposition of such burdensome restrictions upon liberty, and more particularly, upon the federally protected rights of appellants herein to meaningfully participate in the total election process of the State of Illinois as is secured to them by the Fifteenth Amendment to the Constitution of the United States, and to further lawfully exercise their First Amendment rights of free speech and of association as secured to applicants pursuant to the provisions of the First and Fourteenth Amendments to the Constitution of the United States.

It is, we believe, significant to note that only the city officials who are named as defendants in the trial court below urge the Constitutional validity of the provisions of the Illinois Election Code challenged herein. These

defendants, city officials, have advanced matters of cost as being the compelling interest that the State has in imposing the higher and most restrictive burden upon the person who would qualify for public office as an independent candidate. We, however, would join with the Honorable Wilbur N. Pell, one of the members of the District Court three judge panel who in his dissenting opinion filed in the trial court below observed that ". . . the cost of preventing dilution of fundamental liberties should be one rather willingly borne . . ." Judge Pell also properly pointed out that no evidentiary hearing had been held before the three judge panel in the matter of proof of a compelling state interest, though the majority on the District Court panel was willing to find that such an interest did exist on the basis of the record. It is to be noted, however, that neither the Governor, the Chief Executive of the State, nor the Attorney General, the Chief law enforcement officer of Illinois, could find nor urge the existence of any compelling State interest that would justify the imposition of the burdensome restrictions confronting an independent candidate for public office as are contained in the provisions of the Illinois Election Code challenged herein. As was further observed by Judge Pell in his dissenting opinion, ". . . We must indeed search diligently for any rational justification for the exclusionary policy directed toward the indeed candidate . . ." in Illinois. The Illinois procedures challenged herein cannot pass muster against the charge of invidious discrimination and unconstitutional abridgment of the right to vote. *Moore v. Ogilvie*, 394 U.S. 814, 818 (1969). Thus, the substantial federal question. *Baker v. Carr*, 396 U.S. 186 (1962); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Hadnott v. Amos*, 394 U.S. 358; *Reynolds v. Sims*, 377 U.S. 533; *McPherson v. Blacker*, 146 U.S. 1 (1892); *Weisberg v. Powell*, 417 F.2d 388 (7th Cir. 1969); and *Briscoe v. Kusper*, U.S.C.A. 7th Cir. No. 18390 (1970).

CONCLUSION

For the foregoing reasons, appellants respectfully submit that jurisdiction by this Honorable Court should be noted. Further, that judgment of the United States District Court for the Northern District of Illinois, Eastern Division, which denied to appellants herein injunctive relief; upheld the constitutionality of the provisions of the Illinois Election Code challenged herein, and ordered the dismissal of the cause of action asserted by these appellants should be reversed.

Respectfully submitted,

Thomas N. Todd
357 East Chicago Avenue
Chicago, Illinois 60611
(312) 649-8431

Robert L. Tucker
840 East 87th Street
Chicago, Illinois 60619
(312) 994-2600

Kermit E. Coleman
6 South Clark Street
Chicago, Illinois 60602
(312) 726-6180

Attorneys for Plaintiffs-Appellants.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

(Title Omitted)

MEMORANDUM OF LAW OF DEFENDANTS' RICHARD OGILVIE, GOVERNOR OF THE STATE OF ILLINOIS, WILLIAM J. SCOTT, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, AND VICTOR L. SMITH, CHAIRMAN OF THE REPUBLICAN STATE CENTRAL COMMITTEE OF THE STATE OF ILLINOIS, IN SUPPORT OF PLAINTIFFS' REQUEST FOR INJUNCTIVE AND DECLARATORY RELIEF

1. The issues in this case, as framed by the pleadings of the parties, is whether the following statutory requirements, violate the provisions of the First, Fourteenth and Fifteenth Amendments of the United States Constitution. The three statutes, all part of the Illinois Election Code (Chapter 46, Illinois Revised Statutes, 1969) are:

(a) Section 10-3, which requires an independent candidate for Mayor of the City of Chicago to obtain not less than 5%, nor more than 8%, signatures on his nominating petition of the number of persons who voted at the last preceding election for this office, while the Democratic and Republican candidates are only required to have 1/2% of said number.

(b) Section 10-6, which requires an independent candidate for the coming mayoralty election in Chicago to file his nominating petition by February 1, 1971, and

(c) Section 10-4, which Plaintiffs contend requires that an independent candidate's petition cannot be signed by one who had voted at the previous primary for Mayor of the City of Chicago.

I

Section 10-3 of the Illinois Election Code is in violation of the First and Fourteenth Amendments of the United States Constitution

2. Section 10-3 discriminates against independent candidates in several ways. An independent candidate is required to file a nominating petition for Mayor of the City of Chicago signed by not less than 5% of the number of persons who voted at the last election for said office while Democratic or Republican nominees were only required to have petitions containing only one-half of one percent of the number voting at said election. Thus, a Republican candidate needs only 2034 signatures, a Democratic candidate needs only 4099 signatures, while an independent candidate needs at the very minimum 58084 signatures. See Chicago Board of Election Commissions 1971 Calendar Supplement attached as an exhibit hereto. There is no impelling State interest for this discrepancy and invidious discrimination. Forty-two States require third parties to obtain the signatures of only 1% or less. *Williams v. Rhodes*, 393 U.S. 23, ... footnote 9 (1968). What was said in *Williams v. Rhodes* (page 25) is equally applical here, namely, that ". . . these various restrictive provisions make it virtually impossible for any party to qualify on the ballot except the Republican and Democratic Parties." It must also be remembered that it is even more difficult for an independent candidate to obtain signatures than it would be for an independent party. Yet a whole new State political party needs only 25,000 signatures throughout the entire State for state offices, (Section 10-2), while a single independent candidate for only the office of Mayor of Chicago, needs almost 60,000 signatures. This also is an invidious discrimination against one seeking the office of Mayor of Chicago.

3. Further, an independent candidate's petition for Mayor of Chicago cannot exceed 8% of the vote cast at the last election for this office, but no limitation is placed on the maximum number of signatures that a Republican or Democratic nominee may have. thus it was reported in the press that the Democratic nominee filed a petition containing approximately 750,000 signatures, but an independent candidate is limited to a maximum of 92,935 signatures. What is the impelling State interest in this?

Under the minimum number of signatures required by Section 10-3, namely 2034 signatures for a Republican, 4099 for a Democrat, and 58,084 for an independent, one Republican signature accomplishes what it takes 30 independent signatures to do. One Democratic signature has 15 times the value of an independent signature. A Democratic signature has only one-half the value of a Republican signature. Clearly this is a violation of the one man, one vote doctrine; is a debasement or dilution of a citizen's vote and is weighing votes differently, according to party, thus denying equal protection of the laws to independent candidates in violation of the Fourteenth Amendment, *Baker v. Carr*, 369 U.S. 186, *Reynolds v. Sims*, 377 U.S. 533 (1964). It is also a denial of due process, *Moore v. Ogilvie*, 394 U.S. 814. It also impairs and limits plaintiff's "liberty" without a compelling State interest, *Briscoe v. Kusper*, No. 18390, U.S.C.A., 7th Circuit, December 22, 1970. It's also a violation of the First Amendment, *Williams v. Rhodes*, 393 U.S. 23 (1968).

II.

Section 10-6 is Unduly Restrictive and has no Compelling State Interest

Section 10-6 requires mayoralty petitions of independent candidates to be filed by February 1, 1971. Yet the ballots for the election in question can not be printed until after the primary is held on February 23, 1971. Section 10-6, therefore, is unduly restrictive and has no compelling State interest, *Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968), *People v. Telford*, 103 Ill. App. 2d 132, 137 (1968).

Respectfully submitted,

William J. Scott
Attorney General
State of Illinois

Bernard Genis
Chief, General Law Division, Of Counsel
Room 820, 160 North LaSalle Street
Chicago, Illinois 60601
793-2522